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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 701

WILLIAM OTHAR KITCHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 148; Pet. App. 8–9) is reported at 295 F. 2d 508.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1961 (R. 149; Pet. App. 9). A petition for rehearing was denied on December 6, 1961 (R. 153). On January 2, 1962, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 25, 1962, and on that date, Mr. Justice Black further extended the time for filing a petition for a writ of certiorari to and including February 4, 1962. The petition for a writ of certiorari was filed on Monday, February 5, 1962. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to allow petitioner to examine a federal agent concerning the legality of a search, when no pretrial motion to suppress had been filed.

RULE INVOLVED

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity thereof did not exist or the defendant was

not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

An indictment filed in the United States District Court for the Middle District of Georgia charged petitioner and Joseph T. Taylor with transporting and possessing whiskey in an unstamped container, in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (R. 2). Taylor pleaded guilty and testified as a government witness at petitioner's jury trial. Petitioner was convicted and sentenced to imprisonment for three years (R. 142).

1. *The crime.*—In February 1960, Joseph T. Taylor agreed to allow petitioner to store moonshine whiskey in a chicken house adjoining the garage at Taylor's residence (R. 75). Periodically in the nighttime, petitioner, after identifying himself at the Taylor house, would transfer moonshine whiskey which he had brought by vehicle to this shed. He was assisted occasionally in the unloadings by Taylor and his brother-in-law (R. 94, 97–98, 100, 103). Between May 1960 and August 1960, a paid informer of the Alcohol and Tobacco Tax Unit observed petitioner transfer objects between a vehicle and the shed (R. 18–22, 28). On August 29, 1960, the informer notified federal agents that he had located petitioner's liquor storehouse (R. 46). About 11 a.m. on November 4, 1960, federal and state agents went to Taylor's home (R. 37, 42–43). Upon being informed by Mrs. Taylor that her husband was absent, they departed. They came back and, finding that Taylor still had not re-

turned home, told Mrs. Taylor that they had information that moonshine whiskey was being stored on the premises. Mrs. Taylor replied that it was in the shed (R. 43–44, 52). The agents then went to the shed and, looking through a crack in the door, saw stacked fruit jar cases (R. 52). When Taylor arrived shortly thereafter, the officers told Taylor that they had reports that liquor was stored there, but that they had no search warrant. Taylor consented to a search of the shed.[1] He accompanied them to the shed, took a key from his pocket and opened the lock on the shed door (R. 37, 40, 50–51, 90, 93–94). The agents found 1037 ½ gallons of non-taxpaid whiskey in the shed (R. 38). At the trial, petitioner denied that he had used the shed (R. 108–120).

2. *The motion to suppress evidence.*—Petitioner failed to file a motion to suppress evidence before trial. Petitioner, in his cross-examination of federal agent Williams at the trial, brought out testimony that, prior to the raid, the agents had looked into the shed through a crack in the door and testimony that Williams had believed that the residence was rented to Taylor, rather than to Mrs. Taylor (R. 52). When petitioner asked Williams for the second time if he had a search warrant, the court interrupted the cross-examination, questioning the relevancy of such an inquiry (R. 52–53). Petitioner then requested leave to move orally to suppress the evidence concerning the search of

[1] Petitioner conceded below and does not here dispute Taylor's consent (R. 58–61). The complete conversation between the agents and Taylor is not in the record. The court sustained petitioner's objection to the conversation on the ground of hearsay (R. 37–38, 39).

the shed (R. 53–55). Petitioner's position was that, according to the evidence, before Taylor, the lessee, had consented to the search, the agents had looked through a crack into the shed and had seen fruit jar cases, and that this action had invalidated Taylor's consent (R. 54–61). Petitioner attempted to excuse his failure to file a motion to suppress before trial on the ground that the complaint, upon which the warrant for Taylor's arrest had been based, stated only that Taylor had given his permission to the search after being advised of his rights concerning a search warrant (R. 55).[2] The trial judge refused to entertain the motion, holding that petitioner's counsel knew prior to trial that the government planned to rely on a consent search and that petitioner should have challenged the consent prior to the impaneling of the jury (R. 58–61).

3. *The motion for rehearing in the court of appeals.*—In his motion for rehearing in the court below, petitioner claimed that Taylor had had no authority to consent to the search of the shed because he had rented it to petitioner (R. 150–152). Taylor had testified that he had "rented" petitioner the chicken house as a storage place for moonshine whiskey for the sum of $10 per week which amount was to have been applied to the payment of a truck purchased from petitioner (R. 75, 79, 80–81). This testimony had been adduced after petitioner's oral

[2] The complaint stated in part (R. 12): "I explained Taylor's rights to him regarding a Federal Search Warrant and his rights to waive. Taylor waived his rights to a Federal Search Warrant and inside a shed alongside his garage there was 1037 ½ gallons of nontaxpaid whiskey * * *."

motion to suppress. Petitioner had not renewed his motion on this ground.

ARGUMENT

1. Rule 41(e), F.R. Crim. P. (*supra*, pp. 2–3) provides that a motion to suppress evidence "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." The trial judge did not abuse his discretion in refusing to entertain a motion to suppress evidence made during the trial, and more specifically in refusing to permit petitioner to examine federal agent Williams further concerning the legality of the search.

Although petitioner concedes that he had sufficient opportunity to file the motion before trial (R. 60–61), he argues that he was not aware of the ground for the motion—the action of the agents in peering through the crack of the shed—because he relied upon the statement in the formal complaint on file that Taylor had knowingly waived his right to a search warrant. But the statement in the complaint does not excuse petitioner's failure to move for suppression before trial. It was not misleading. Petitioner's counsel should have known that the facts leading up to Taylor's waiver might bear upon its validity and that his conclusion concerning its legality might differ from that of the complainant. Moreover, the indictment specifically charged petitioner with possession and informed him of the seized evidence, and the complaint

informed him of the place of seizure and of Taylor's consent to the search. Petitioner was therefore aware that he had standing to file a motion to suppress (R. 54). Since no adequate reason for the failure to file the motion was given, the trial court properly refused to permit further examination of agent Williams on this issue. See *Segurola* v. *United States*, 275 U.S. 106, 111–112; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Sansone*, 231 F. 2d 887, 892 (C.A. 2), certiorari denied, 351 U.S. 987; *United States* v. *Salli*, 115 F. 2d 292 (C.A. 2).[3]

2. In any event, sufficient facts were developed to establish the legality of the search and seizure. They show reasonable police conduct in looking into the shed as well as in the subsequent entry. The federal agents made no attempt to enter the shed illegally. Initially when they confronted Mrs. Taylor, in the absence of her husband, they left the premises without making any search. Upon their return, again finding Taylor absent, they were told by his wife that the illegal liquor was in the shed. The agents at that time merely peered into its interior through a crack in the door. When Taylor appeared, the officers did not demand entry and did not attempt to break into the shed. Rather, they only entered the shed after Taylor consented and opened the door with his key. Taylor gave his consent after waiving his right to have the

[3] *Conter* v. *United States*, 215 F. 2d 321 (C.A. D.C.) (see Pet. 4), does not support petitioner. In that case, counsel was not aware of the seized evidence. Counsel's lack of knowledge may be explained by the fact that the defendant had been adjudged mentally incompetent shortly after his apprehension and had spent nearly a year in a mental institution.

agents obtain a search warrant. That this consent was not coerced is manifested by the fact that the agents permitted Taylor to go to his place of employment and surrender to the authorities on the following day (R. 91).[4]

3. The claim that Taylor could not consent because he had subleased the property to petitioner is both untimely and without merit. No objection on this ground was made at the trial and no renewed motion to suppress was made after Taylor's testimony. This afterthought was first mentioned in the court of appeals, and comes too late for consideration.

Moreover, on the merits, the evidence shows that Taylor did have authority to open the shed with his key and consent to the search. There was no real lease of the shed. Taylor, as a coconspirator, had agreed to permit petitioner to use the shed for the specific purpose of storing contraband whiskey. The manner of compensating Taylor for his illegal action by a payment from petitioner denominated rent did not give petitioner any cognizable legal interest in the premises. That Taylor had not surrendered all control over the shed is demonstrated by two facts: (1) Taylor had possession of a key to a lock which had been placed on the shed by petitioner; (2) petitioner,

[4] *Taylor* v. *United States*, 286 U.S. 1, cited by petitioner (Pet. 4–5) is inapposite. The agents in that case did not secure any consent prior to their entry. Rather, they broke into a garage in the early morning hours after they had smelled the odor of whiskey and had looked through a small opening in the garage.

in each instance that he entered the shed, first notified the Taylors.[5]

CONCLUSION

For the foregoing reasons, it is respectively submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.

[5] The present case is materially different from *Chapman* v. *United States*, 365 U.S. 610, on which petitioner relies (Pet. 5). In that case, the landlord who rented a house for dwelling purposes broke into the home with federal agents because he believed that it was being used for an illegal purpose. The landlord had surrendered all control over the dwelling pursuant to a legal agreement and did not know that his tenant was conducting an illegal business. In the present case, there was no house, no legal rental agreement, and no surrender of control by Taylor.

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